INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	9
APPENDIX A—Statutes Involved	11
APPENDIX B—Findings and Opinion of the Commission	15
Order Appealed From	24
Order of Affirmance	25
Opinion	26
Order for Proceedings and Notice of Hearing Pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934	27
Amending Order	31

TABLE OF CASES CITED

Chaffee v. United States, 18 Wall. 516, 542, 8 U. S. 908, 913, 21 L. Ed. 908	8
Chas. Hughes & Co. v. SEC, 139 Fed. (2) 434 (2 Cir., 1943)	4, 7

PAGE

Cliquot's Champagne, 3 Wall. 114, 141, 18 L. Ed. 116 8

Coplin v. United States (1937), 88 Fed. (2d) 652 8

Hallgarten v. Lee (S. D. N. Y., Civ. Action 18-347, 1943) 7

Jaffe v. Cruttenden, 107 N. E. 2d 715 7

National Labor Relations Board v. Phelps (C. C. A., 5th Cir., 1943), 136 Fed. 2d 562 4

Muser v. Magone, 155 U. S. 240, 15 S. Ct. 77 8

Virginia v. West Virginia (1914), 238 U. S. 202, 35 S. Ct. 795 7, 8

Whelan v. Lynch, 60 N. Y. 469, 10 Am. Rep. 202 8

Wong Yang Sung v. McGrath, 70 S. Ct. 445, 339 U. S. 33 (1950) 5

STATUTES CITED

Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. Sec. 1001 et seq., 5 U. S. C. A. Sec. 1001 et seq. 5

Labor-Management Relations Act, 1947, 61 Stat. 139, 39 U. S. C. A. Sec. 153(d) 6

Securities Act of 1933, 48 Stat. 74, 15 U. S. C. 77a, et seq. 2, 3, 5

Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. A. 78a, et seq. 2, 3, 5

28 U. S. C. Sec. 1254(1) 2

U. S. Code Cong. Serv., 80th Cong., 1st Sess. (1947), p. 1143 6

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

CHARLES M. WEBER, individually, doing business under the firm name and style of WEBER-MILLICAN & COMPANY,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the Order of the Securities and Exchange Commission which order revokes petitioner's registration as a broker-dealer, and expels him from the National Association of Securities Dealers, Inc.

Opinion Below

The findings and opinion of the Commission are reported in Securities Exchange Act release No. 5087, and appear herein in Appendix B, *infra*, pp. 15-25.

The opinion of the Court of Appeals for the Second Circuit is officially reported in 222 Fed. (2d) 822, and it, together with the order of the Court is set forth herein in Appendix B, *infra*, pp. 25-26.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 26, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Whether, in view of the fact that the Securities and Exchange Commission, in the final analysis, functions as investigator, prosecutor and adjudicator, and in the instant case had prejudged the charges against petitioner, petitioner herein was afforded a fair hearing in accordance with traditional, constitutional concepts of due process.

2. Whether certain evidence introduced by Commission representatives, accepted by a Commission examiner over protest of petitioner, to support Commission charges, and on which the Commission generally relies to sustain its findings in this case, as well as others, is proper evidence in accordance with established judicial criteria.

3. Whether, in view of question 2, supra, there is requisite evidence in this record to support the findings of the Commission.

4. Whether the sanctions imposed on petitioner by the order of the Commission are excessive and an abuse of administrative discretion.

Statutes Involved

The pertinent provisions of the Securities Act of 1933, 48 Stat. 74, 15 U. S. C. A. 77a, *et seq.*, and of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. A. 78a *et seq.*, and the rules of the Securities Exchange Commission

promulgated pursuant thereto, are set forth in Appendix A, *infra,* pp. 11-14.

Statement

On February 20, 1953, respondent issued an Order directing that proceedings be instituted and hearings be held in New York on certain questions set forth in the Order, said hearings to take testimony on which the Commission could determine whether the registration of the petitioner as a broker-dealer should be revoked or suspended in the public interest (App. B, *infra,* pp. 27-31). This Order was amended by a further Order of the respondent dated the 19th of March, 1953 (App. B, *infra,* pp. 31-33). The Order alleged that the Commission had been informed of certain practices engaged in by the petitioner herein in the sale of shares of stock of the Inland Oil Company and of the Magma King Manganese Mining Co., which, if true, tended to show that petitioner had violated certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as certain rules of the respondent promulgated pursuant thereto.

The Hearing Examiner designated by the Commission conducted several hearings and filed a recommended decision on March 15, 1954.

The Commission thereafter entered an order on September 14, 1954 revoking the registration of petitioner as a broker-dealer and expelling petitioner from the National Association of Securities Dealers, Inc. (App. B, *infra,* pp. 24-25).

On appeal, the Court of Appeals for the Second Circuit affirmed the Order of the Commission, holding that the Commission was justified on the evidence in finding that petitioner was guilty of fraudulent and wrongful activity in connection with the underwriting of the Inland Oil stock, and further holding that the Commission was justified in

its finding that the petitioner was selling the shares of the Magma King Manganese Mining Co. at a price greatly disparate with the current market price without disclosing the same to the general public. The Court of Appeals further adhered to its prior decision [*Chas. Hughes & Co.* v. *SEC*, 139 Fed. (2) 434 (2d Cir., 1943)] that the National Daily Quotation sheets were competent evidence of market price, and also held that the sanctions imposed on petitioner by the Commission were not *so excessive*, as to constitute an abuse of discretion (emphasis supplied).

Reasons for Granting the Writ

In insuring to a litigant the Constitutional right and safeguard of due process of law, a fair trial, by an unbiased and non-partisan trier of facts, is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding as when it is done in a court of law. *National Labor Relations Board* v. *Phelps* (C. C. A., 5th Cir., 1943), 136 Fed. 2d 562.

The Securities and Exchange Commission, by the very nature of its structure and established procedure, precludes a fair and unbiased trial or hearing, either before itself or its designated agents. Yet this Commission, created by Congress and charged by it with the supervision and regulation of a vital segment of American Economic life, continually subjects litigants, brought before it through the operation of its own administrative machinery, to a denial of this fundamental concept of American justice.

Petitioner herein, a man in his sixties and engaged in the securities business for over thirty years without a blemish on his record is suddenly cut off from his means of livelihood and deprived of valuable property rights by an Order of this partisan body.

Petitioner's activities were investigated by agents of the Commission, largely on their own initiative, who reported

back to the Commission that Petitioner had committed certain acts, and engaged in certain practices, which were violative of provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.

The Commission thereon issued its Order directing that a hearing examiner, appointed by the Commission and responsible to it, conduct hearings on the charges levelled against Petitioner, and report back to the Commission, as to the validity thereof. Yet the Commission had already prejudged the guilt of the petitioner herein respecting these charges and had so advised its field agents. (See telegram of SEC San Francisco office sent the same day as the Order directing the hearings. App. B, *infra*, p. 33).

After extended hearings before the Commission Examiner, during which the Commission agents (Counsel for the Division of Trading & Exchanges) acting as prosecutors for the Commission, introduced certain alleged evidence in support of certain of the charges (which evidence the examiner had no alternative but to admit into the record, despite the protests and arguments of Counsel for the Petitioner, because the Commission had previously sustained the evidence and relied heavily thereon to sustain prior positions of consequence taken by it), the examiner filed his findings and recommended decision, sustaining the charges.

The Commission, after alleged independent review in its capacity of a quasi-judicial body, sustained the Examiner and entered the Order complained of herein.

Much criticism, judicial and otherwise, has been levelled at Administrative determinations arrived at after partial and partisan consideration by *administrative officers*. [See *Wong Yang Sung* v. *McGrath*, 70 S. Ct. 445, 339 U. S. 33 (1950)], and led to the Congress of the United States enacting the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.*, 5 U. S. C. A. § 1001 *et seq.*

This criticism, and judicial disapproval, is even more deserving and vital, where, as here, and by its very structure, *an agency determination* is unavoidably partisan. This was also recognized by the Congress of the United States when it legislated a fundamental change in the internal structure of the National Labor Relations Board by the enactment of the Labor-Management Relations Act, 1947, 61 Stat. 139, 29 U. S. C. A. § 153 (d); U. S. Code Cong. Serv., 80th Cong., 1st Sess. (1947), p. 1143.

Yet this Commission continues to operate in a manner which has been condemned and legislated against as being violative of fundamental due process.

This Court, being the final arbiter of functional due process of law should review the methodology and structure of the Securities and Exchange Commission in the light of the foregoing, and determine whether its very basic structure afforded Constitutional due process to the Petitioner herein.

The decision below again sanctions the use by the Commission, in proceedings brought by it, before itself, of wholly unreliable and arbitrary data (the National Daily Quotation Sheets), as evidence, and often the only evidence, of market price prevailing at a certain time, or during certain periods of time, in respect to types of securities which are not listed on National Exchanges. After *market price* has been determined in this manner, the Commission proceeds to make determinations relative to practices of individuals or groups in dealing with these securities. Such determinations have been of serious consequence, and unless it is determined by this Court that the data do not satisfy established judicial standards of proper evidence before a Court of Law or an administrative tribunal, consequential determinations will continue to be made by the Commission and its agents, and to be based thereon.

The sufficiency of the National Daily Quotation Sheets as proper evidence of market price of securities reported therein, was initially questioned in an appellate tribunal, in the *Hughes* case, *supra*, and therein sustained by that Court, although not without apparent reservation. Certiorari in that case was denied by this Court in 321 U. S. 786.

In the period intervening between the *Hughes* decision and the present decision (again of the Court of Appeals of the Second Circuit), the Commission has had frequent occasion to utilize the data contained in the National Daily Quotation Sheets in supporting positions that it has taken on various matters, all in reliance on the position taken by the Second Circuit Court. No other court has passed on the evidentiary value of these sheets, if any, other than the Supreme Court of Illinois in 1952 in the case of *Jaffe* v. *Cruttenden*, 107 N. E. 2d 715, which relied on the holding of the *Hughes* case as its authority for sustaining the use of the sheets as evidence of market price, and the United States Southern District Court of New York in the unreported case of *Hallgarten* v. *Lee* (S. D. N. Y., Civ. Action 18-347, 1943). This last case, in which the respondent herein filed a brief *amicus curia* in support of the National Daily Quotation Sheets, was tried before the Hon. James Alger Fee wherein he found as a fact that the sheets "do not establish a market value even among dealers."

The testimony in this case relative to the method of compilation of the material contained in the sheets in question (Doc. 49, pp. 396-462) and what can be ascertained from a reading of the sheets (Doc. 49, pp. 469-473) clearly demonstrates that the "sheets" cannot be relied on as evidence of current market price of certain securities, or evidence of market price at all, and further indicates that these "sheets" are not compilations which meet accepted judicial standards of trustworthiness as prerequisite to being acceptable as evidence to prove a fact before a Court of Law or a Judicial tribunal. *Virginia* v. *West Virginia* (1914), 238 U. S.

202, 35 S. Ct. 795, 800; *In re Cliquot's Champagne*, 3 Wall. 114, 141, 18 L. Ed. 116, 120; *Chaffee* v. *United States*, 18 Wall. 516, 542, 85 U. S. 908, 913, 21 L. Ed. 908, 912; *Muser* v. *Magone*, 155 U. S. 240, 15 S. Ct. 77, 81; *Coplin* v. *United States* (1937), 88 Fed. (2d) 652, 669; *Whelan* v. *Lynch*, 60 N. Y. 469, 10 Am. Rep. 202.

These "sheets" are wholly unsuitable and dangerous to litigants, when used for the purposes to which the respondent herein puts them, and in view of the position taken by the Court of Appeals for the Second Circuit in the *Hughes* case, *supra*, and in the instant case, the important question of the propriety of their use by the respondent as a prime basis on which it determines valuable property rights should be definitively passed upon by this Court.

Without the so-called evidence of these sheets in the instant case, which was the sole evidence introduced by the respondent to sustain its position relative to the charges concerning the Magma King transactions of petitioner herein, the finding of the respondent on this phase of the case is wholly without support and unwarranted by the record herein.

Were the Magma King findings of the respondent to be removed from this record as having no basis in fact or law, the question of the sanctions imposed on petitioner by the Commission, and affirmed by the lower Court, come in for serious question. Petitioner has contended, and does now contend, that the record on the Inland Oil phase of the case does not support the findings of the Commission by the requisite "substantial evidence" required by the pertinent statutes. Even were it assumed that such findings were amply supported, the sanctions imposed are the result of arbitrary action on the part of the Commission, and of a nature which exceeds administrative discretion, soundly exercised. The Court below itself found that "the sanctions imposed * * * were certainly not *so excessive* as to consti-

tute an abuse of administrative discretion." (Emphasis supplied.) (App. B, *infra*, p. 26.) If the sanctions are *excessive at all*, they are improper, and should be modified by this Court as provided for by law (App. A, *infra*, p. 11).

It is of great importance to the Securities industry that the laws relating to Securities and Security Exchanges be fairly and impartially administered by the Commission, and that its ability presently to so do be reviewed by this Court, and that, in the administration of these laws, that the question of the evidentiary value of the National Daily Quotation sheets, either before the Courts of this country or the Commission itself, be determined by this Court. From a consideration of the foregoing, will flow the determination as to whether this petitioner was accorded due process of law by the Commission.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

NEMEROFF, JELLINE, DANZIG & PALEY,
Attorneys for Petitioner.

AARON L. DANZIG, Esq.,
of Counsel.

APPENDIX A

Statutes Involved

Section 25 of the Securities Exchange Act of 1934 provides in part:

> (a) Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court, affirming, modifying and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28. * * *

Section 17(a) of the Securities Act of 1933 provides in part:

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. * * *

Section 15 of the Securities Exchange Act of 1934 provides in part:

* * *

(c)(1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent. * * *

Rule X-15C1-2 provides in part:

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in section

15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading. * * *

Section 15 of the Securities Exchange Act of 1934 provides in part:

(a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine. * * *

Section 15A of the Securities Exchange Act of 1934 provides in part:

> (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b) of this section, * * * under the terms and conditions hereinafter provided in this section, * * *
>
> (b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that— * * *
>
> (7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges;
>
> (8) the rules of the association provide that its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules; * * *

APPENDIX B

Findings and Opinion of the Commission

(Securities Exchange Act Release No. 5087)

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

September 14, 1954

In the Matter of

CHARLES M. WEBER, doing business as WEBER-MILLICAN & COMPANY, 50 Broadway, New York 5, New York.

(Securities Exchange Act of 1934—Sections 15(b) and 15A (1)(2))

BROKER-DEALER REGISTRATION

Grounds for Revocation—Expulsion from Registered Securities Association

Where broker-dealer sold shares as underwriter without disclosing that issuer's expenses had been several times as great as estimated in prospectus and included items incurred for broker-dealer's benefit and that the issuer's assets had been virtually exhausted *held* willful violations of Section 17(a) of the Securities Act of 1933 and Section 15(c)(1) of the Securities Exchange Act of 1934.

Where broker-dealer sold shares of a company to the public on the basis of false representations that the sales price was the market price and omitted to disclose that the sales price was far in excess of the market price *held*

willful violations of Sections 17(a) of the Securities Act of 1933 and Section 15(c)(1) of the Securities Exchange Act of 1934.

APPEARANCES:

EDMOND G. BLUMNER and PHILIP WAGNER, for the Division of Trading and Exchanges.

EDWARD A. KOLE, ABRAHAM M. HERMAN, BERNARD G. NEMEROFF and PERRY W. HOWARD, for Charles M. Weber, doing business as Weber-Millican & Company.

These are proceedings under Sections 15(b) and 15A(1)(2) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether Charles M. Weber, doing business as Weber-Millican & Company ("registrant") willfully violated the Securities Act of 1933 and the Exchange Act and the rules thereunder and, if so, whether the public interest requires the revocation of his registration as a broker and dealer and his suspension or expulsion from membership in the National Association of Securities Dealers, Inc. ("NASD").[1]

---

[1] Section 15(b) of the Exchange Act provides in part:

"The Commission shall, after appropriate notice and opportunity for hearing, by order * * * revoke the registration of any broker or dealer if it finds that such * * * revocation is in the public interest and that (1) such broker or dealer * * * has willfully violated any provision of the Securities Act of 1933, as amended, or of this title, or of any rule or regulation thereunder * * *."

Section 15A(1) provides as follows:

"The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding 12 months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or

The order for proceedings alleges that, between April 1, 1950, and September 1, 1951, registrant sold common stock of Inland Oil Company ("Inland"), and, in connection therewith, made false and misleading statements and omitted to state material facts concerning the expenses of distribution of the stock, the extent and results of oil-well drilling operations, and the purposes for which the proceeds from the sale of the stock would be used. The order for proceedings, as amended, further alleged that, between December 1, 1952, and January 22, 1953, registrant sold common stock of Magma King Manganese Mining Company ("Magma King") and, in connection therewith made false representations concerning the current market price of such stock and the availability of the stock in the market, and effected sales at prices far in excess of the prevailing market prices without disclosing to the purchasers such market prices. It is alleged that such conduct constituted violations of Section 17(a) of the Securities Act of 1933 and Section 15(c)(1) of the Securities Exchange Act of 1934.[2]

---

* * * (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder * * *."

[2] Section 17(a) of the Securities Act of 1933 provides:

"It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 15(c)(1) of the Securities Exchange Act of 1934 provides:

"No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any

After appropriate notice, hearings were held before a hearing officer. Proposed findings and briefs were submitted by the Division of Trading and Exchanges and the registrant, and the hearing officer filed a recommended decision in which he recommended that registrant's registration be revoked. Exceptions were filed by registrant and we heard oral argument. Our findings are based on the basis of an independent review of the record.

Inland Stock Transactions

In May 1949, Inland filed a Notification pursuant to Regulation A under the Securities Act of 1933 covering an offering of 600,000 shares of common stock at 50 cents a share. Registrant was named as underwriter and the underwriting commissions were fixed at 25%, or 12½ cents a share. After sales of approximately 46,000 shares had been effected in 1949, the underwriting agreement was amended and a revised prospectus, dated April 15, 1950, was filed.

---

transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent."

Rule X-15C1-2 provides in part:

"(a) The term 'manipulative, deceptive, or other fraudulent device or contrivance,' as used in section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

"(b) The term 'manipulative, deceptive, or other fraudulent device or contrivance,' as used in section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading."

The revised prospectus stated that, pursuant to the new underwriting arrangements, Inland agreed to pay the expenses of the sale of the balance of the issue, including the cost of preparing and printing the prospectus, additional printing and advertising in an amount not in excess of $10,000 and fees of geologists, counsel and accountants. It also stated: "Expenses of issue, including professional fees, printing and advertising, travelling expenses, and administrative costs in the preliminary stages, are estimated at $15,000 to $17,500 leaving a maximum of approximately $190,000, available to the Company when, as and if the entire issue is sold."

Between April 22, 1950, and September 1, 1951, registrant as underwriter sold 531,900 shares of Inland stock for $265,950, of which it retained $66,468.65 as commissions and remitted the balance of $199,481.35 to Inland. Throughout this period the prospectus dated April 15, 1950, containing the statements mentioned above, was used in effecting sales. However, amounts were expended by Inland which were greatly in excess of those estimated in the prospectus and part of which had no relationship to the cost of selling the stock and were solely for registrant's benefit.

Inland occupied a small room in registrant's suite of offices. Between April 15, 1950, and July 1, 1951, Inland expended $62,773.69 for various items described as payroll, postage and mailing, office expense, travel and entertainment, furniture and fixtures, telephone and advertising and sales promotion. The record shows that payments were made by Inland for furniture and typewriters which were used by registrant and not by Inland, and for the cost of printing and mimeographing under registrant's letterheads of reports and analyses of companies engaged in the production of sugar, merchandising and other businesses, reprints from newspapers, forms of sales confirmations, form letters and other material for use in registrant's business. The postage and mailing items also included expenditures

for registrant's benefit, and Inland's payroll included salaries paid to employees hired by registrant whose work was done for registrant and not for Inland.

Registrant asserts that the financial transactions between him and Inland were to be the subject of a future accounting and that any diversion of funds from Inland was not the fault of registrant but of Inland's treasurer. The record does not support these assertions. There was no resolution of Inland's Board of Directors or other written evidence of any arrangement for a later accounting. Registrant personally presented bills for amounts covering items not incurred for Inland's benefit to Inland. He has not shown any justification for including items of his own expenses, many of which were paid to him directly by Inland, nor did he maintain any records identifying the amounts attributable to him as distinguished from Inland. We find that registrant caused the improper diversion of funds from Inland and that his failure to disclose such diversion and the amounts paid out as expenses when he sold Inland stock on the basis of the April 15, 1950 prospectus which contained much lower estimates of expenses, constituted fraudulent conduct under the provisions cited above.

Inland participated at various times in drilling operations and other exploratory work in Michigan, Kansas and Louisiana, all of which were unsuccessful. On July 1, 1951, as a result of the unsuccessful drilling and the payment of large amounts of expenses, Inland's cash balance had been reduced to $1,825.48 and it owned some pipe which was later sold for $7,500. Nevertheless, between July 1 and September 1, 1951, registrant sold 23,285 shares of Inland for $11,642.50 on the basis of the April 15, 1950 prospectus without disclosing that Inland had theretofore secured through the sale of the major part of its stock offering approximately $190,000 and that such funds had been virtually exhausted. This omission also constituted a fraud on the purchasers of the shares.

In addition, the record shows that registrant's salesmen made affirmative false representations to prospective purchasers as to the success of Inland's drilling operations, the amount of oil being produced, the realization of profits by the company, and the likelihood of the stock being traded on a securities exchange or the over-the-counter market at increased prices.

Magma King Stock Transactions

Between December 1, 1952, and January 22, 1953, registrant purchased 40,600 shares of Magma King stock from other brokers and dealers at an average price of 27 cents a share or a total cost to registrant of $10,972, and purchased 46,350 shares from members of the public at an average price of 28.6 cents a share or a total cost of $13,264, making a total of 86,950 shares acquired at a cost of $24,236. During this period registrant sold to the public 87,700 shares at a price, in the case of almost all of the transactions, of 40 cents a share, or a total of $35,170. Registrant's gross profit on the 86,950 shares amounted to $10,544, representing an average markup over cost of 43½%.

During this period Magma King stock was quoted in the daily sheets published by the National Quotation Bureau, which gives the prices bid and asked by interested dealers for securities traded in the over-the-counter market. At various times during the period eight firms, exclusive of one firm which acted on behalf of registrant, placed quotations in the daily sheets ranging from 21 cents to 29 cents a share for bids and from 25 cents to 35 cents for offers, and the record shows that these firms effected purchases and sales, including transactions for and with customers, within the price ranges reflected by the quotations.[3] Registrant's sales

[3] Registrant objected to the admission of these sheets in evidence on the ground that they are circulated primarily among dealers and the quotations therein, while they may afford some indication as to the prices which dealers may trade among themselves, do not give any indication of market prices at which dealers will buy from or sell

to customers were made at prices which exceeded the high offers in the sheets by a total of $9,852, which represented an average markup over such quotations of 11.2 cents per share or 38.9%.

Notwithstanding the prevailing market prices and the fact that registrant was concurrently acquiring shares at prices ranging from 25 to 30 cents a share, registrant's salesmen recommended the stock to purchasers at 40 cents a share without disclosing that the market price was substantially below this amount. In a number of instances registrant's salesmen expressly misrepresented to such purchasers that the current market price was 40 cents, and in one case told a customer that such price was 50 cents but that registrant was able to secure the stock for the customer for 40 cents. Both the failure to reveal that the price at which it sold the stock was substantially above the prevailing market price [4] and the express misrepresentations constituted fraudulent conduct within the meaning of the anti-fraud provisions cited.

Conclusions as to Violations and Public Interest

In effecting both the sales of Inland and Magma King stock, registrant used the mails and instrumentalities of interstate commerce, and on the basis of the facts set forth above we find that registrant willfully violated Section 17(a) of the Securities Act of 1933 and Section 15(c)(1) of the Securities Exchange Act of 1934.

---

to the general public. This objection is overruled. We have held, with judicial approval, that such quotations are admissible as evidence of market prices. *Charles Hughes & Co., Inc.*, 13 S. E. C. 676 (1943), affirmed 139 F. 2d 434 (C. A. 2, 1943); *Allender & Company, Incorporated*, 9 S. E. C. 1043 (1941).

[4] It has been held that it is a fraudulent device for a dealer to charge prices not reasonably related to the prevailing market price without disclosing that fact. *Charles Hughes & Co.*, 139 F. 2d 434 (C. A. 2, 1943).

The public interest requires the revocation of registrant's registration as a broker and dealer and his expulsion from the NASD. The violations in connection with the sale of both the Inland and Magma King stocks, in connection with which substantial losses have been incurred by numerous investors, are clear. In our opinion the violations with respect to either the Inland or the Magma King stock would by themselves require the imposition of this sanction in the public interest, and we cannot accept registrant's contention that the circumstances call for a lesser sanction.[5]

An appropriate order will issue.

By the Commission (Chairman Demmler and Commissioners Rowen, Adams, Armstrong and Goodwin).

ORVAL L. DUBOIS,
Secretary

[Seal]

[5] Registrant asserts that he was interested in making Inland a success and points to the fact that he made trips to inspect Inland's operations and invested some of his personal funds in the company. We regard these facts as of little significance in view of the nature of the violations we have found.

Order Appealed From

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

September 14, 1954

In the Matter of

CHARLES M. WEBER, doing business as WEBER-MILLICAN & COMPANY, 50 Broadway, New York 5, New York.

(Securities Exchange Act of 1934—Sections 15(b) and 15A (1)(2))

Proceedings having been instituted to determine whether the registration as a broker and dealer of Charles M. Weber, doing business as Weber-Millican & Company, should be revoked pursuant to Section 15(b) of the Securities Exchange Act of 1934 and whether said broker and dealer should be suspended or expelled from the National Association of Securities Dealers, Inc., pursuant to Section 15A(1)(2) of said Act;

A hearing having been held after appropriate notice, the hearing officer having filed a recommended decision and exceptions thereto having been filed;

The Commission having this day issued its Findings and Opinion, on the basis of said Findings and Opinion

IT IS ORDERED that the registration as a broker and dealer of Charles M. Weber, doing business as Weber-Millican & Company, be, and it hereby is, revoked, and said Charles M. Weber, doing business as Weber-Millican & Company

be, and he hereby is, expelled from membership in the National Association of Securities Dealers, Inc.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

[Seal]

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At the October Term, 1954, of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, State of New York, on the 26th day of August, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
HON. HAROLD R. MEDINA,
Circuit Judges,

HON. EDWARD J. DIMOCK,
District Judge.

CHARLES M. WEBER, doing business as WEBER-MILLICAN & COMPANY, Petitioner, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	No. 272 October Term, 1954 Docket No. 23317

This petition for review came to be heard at this term, was argued by counsel, and the Court having considered the briefs of the parties and the oral arguments of counsel,

and being fully advised in the premises and having filed its opinion herein on May 20, 1955, it is

ORDERED, ADJUDGED AND DECREED that the order of the Securities and Exchange Commission under review, entered September 14, 1954, in the cause entitled below "In the Matter of Charles M. Weber, doing business as Weber-Millican & Company," be and is hereby affirmed.

CHARLES E. CLARK,
U. S. C. J.

HAROLD R. MEDINA,
U. S. C. J.

Opinion

PER CURIAM.

The Securities and Exchange Commission, through its Division of Trading and Exchanges, charged petitioner with misconduct in transactions involving the Inland Oil Company and the Magma King Manganese Mining Co. The evidence amply supports the Commission's conclusions that petitioner was guilty of fraudulent misstatements and of wrongful diversions of funds in connection with his underwriting of an issue of stock for Inland. And the Commission was equally justified in finding that petitioner had sold Magma King shares to the general public on his own account without adequate disclosure of the great disparity between his sales price and the current market prices. We see no reason not to adhere to our prior decision permitting the introduction of National Daily Quotation Sheets as evidence of such market prices. *Charles Hughes & Co.* v. *S.E.C.*, 2 Cir., 139 F. 2d 434, certiorari denied 321 U. S. 786. The sanctions imposed by the Commission for these serious breaches of duty by the petitioner were certainly not so excessive as to constitute an abuse of administrative discretion. *Wright* v. *S.E.C.*, 2 Cir., 134 F. 2d 733.

Affirmed.

Order for Proceedings and Notice of Hearing Pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C. on the 20th day of February, 1953

In the Matter of

CHARLES M. WEBER, doing business as WEBER-MILLICAN & COMPANY, 50 Broadway, New York 4, New York.

I

The Commission's public official files disclose that:

A. Charles M. Weber, doing business as Weber-Millican & Company, a sole proprietorship, hereinafter referred to as registrant, is registered with the Commission as a broker and dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 and is a member of the National Association Securities Dealers, Inc., a securities association registered pursuant to Section 15A of the Securities Exchange Act of 1934.

B. On May 12, 1949, Inland Oil Company filed with the Commission a Letter of Notification pursuant to Regulation A of the General Rules and Regulations under the Securities Act of 1933 covering an offering of 600,000 shares of 25¢ par value common stock at an aggregate offering price

of $300,000 and a unit price of $.50 per share; said Letter of Notification named Weber-Millican & Company as underwriter of said offering and stated that the underwriting discounts and commissions would be 12½¢ per share; said Letter of Notification was subsequently amended.

II

Members of its staff have reported to the Commission information as a result of an investigation which, if true, tends to show that:

A. During the period from approximately April 1, 1950 to approximately September 1, 1951, registrant sold to various persons and induced such persons to purchase shares of the common stock of Inland Oil Company, and in connection therewith, made false and misleading statements of material facts and omitted to state material facts concerning, among other things, the expenses of distribution of said stock, the extent, duration and results of oil-well drilling operations, and the purposes for which the proceeds from the sale of the stock would be used.

B. Registrant used the mails, the means and instrumentalities of interstate commerce and the means and instruments of transportation and communication of interstate commerce in the sale of securities as hereinabove set forth in Paragraph A of Section II.

C. Registrant effected, otherwise than on a national securities exchange, certain of the transactions hereinabove mentioned in Paragraph A of Section II hereof.

III

The information reported to the Commission by members of its staff as set forth in Section II hereof, if true, tends to show:

A. That registrant violated Section 17(a) of the Securities Act of 1933 in that, in the sale of securities, by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails, registrant employed devices, schemes, and artifices to defraud, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon the purchasers.

B. That registrant violated Section 15(c)(1) of the Securities Exchange Act of 1934 in that registrant made use of the mails and of the means and instrumentalities of interstate commerce to effect transactions in and to induce the purchase and sale of securities otherwise than on a national securities exchange, by means of manipulative, deceptive, and other fraudulent devices and contrivances as defined in Rule X-15C1-2(a) and (b) adopted by the Commission under said Section.

IV

The Commission having considered the aforesaid information, deems it necessary and appropriate in the public interest and for the protection of the investors that proceedings be instituted to determine:

(a) whether the statements set forth in Section II hereof are true;

(b) whether registrant has wilfully violated Section 17(a) of the Securities Act of 1933;

(c) whether registrant has wilfully violated Section 15(c)(1) of the Securities Exchange Act of 1934 and Rule X-15C1-2(a) and (b) adopted by the Commission under said Section;

(d) whether, pursuant to Section 15(b) of the Securities Exchange Act of 1934, it is in the public interest to revoke the registration of registrant;

(e) whether, pursuant to Section 15(b) of the Securities Exchange Act of 1934, pending final determination, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant;

(f) whether, pursuant to Section 15A (*1*)(2) of the Securities Exchange Act of 1934, it is necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of said Section to suspend for a period not exceeding twelve (12) months or to expel registrant from membership in the National Association of Securities Dealers, Inc.

V

IT IS HEREBY ORDERED that a hearing for the purpose of taking evidence on the questions set forth in Paragraph IV hereof, be held at the New York Regional Office, 42 Broadway, New York, New York, on March 16, 1953 at 10:00 A. M., before William W. Swift, Hearing Examiner, or such other hearing examiner as the Commission may designate. Upon the completion of the taking of evidence in this matter the Hearing Examiner shall prepare a recommended decision pursuant to Rule IX(b) of the Rules of Practice, unless such decision is waived.

This order and notice shall be served on registrant, personally or by registered mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice.

Since this proceeding is not "rule making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(Seal)

Amending Order

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C. on the 19th day of March, 1953

[SAME TITLE.]

The Commission, having by order dated February 20, 1953, instituted proceedings pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 in the above-entitled matter;

IT IS ORDERED that Section II of the said order be and the same is hereby amended to read as follows:

II

Members of its staff have reported to the Commission information obtained as a result of an investigation which, if true, tends to show that:

A. During the period from approximately April 1, 1950 to approximately September 1, 1951, registrant sold to

various persons and induced said persons to purchase shares of the common stock of Inland Oil Company, and in connection therewith, made false and misleading statements of material facts and omitted to state material facts concerning, among other things, the expenses of distribution of said stock, the extent, duration and results of oil-well drilling operations, and the purposes for which the proceeds from the sale of the stock would be used.

B. During the period from approximately December 1, 1952 to approximately January 22, 1953, registrant solicited and induced certain persons to purchase common stock of a certain mining company from registrant and sold such securities to said persons and in connection therewith made false representations to said persons, concerning, among other things, the current market price of such securities and the availability of such securities in the market.

C. During the period mentioned in Paragraph B hereof, registrant, as a broker and dealer engaged in the securities business, solicited and induced various persons to purchase common stock of a certain mining company from registrant, and in connection therewith represented that registrant would sell such securities to said persons at prices bearing a reasonable relation to the prevailing market prices for such securities, when in fact registrant intended not to and did not sell such securities to said persons at prices bearing a reasonable relation to the prevailing market prices for such securities, but on the contrary, registrant intended to sell and sold such securities to said persons at prices far in excess of the prevailing market prices therefor, without disclosing to said persons the prevailing market prices for such securities.

D. Registrant used the mails, the means and instrumentalities of interestate commerce and the means and instruments of transportation and communication of interstate commerce in effecting certain of the transactions in, and

in the sale of securities as hereinabove set forth in Paragraphs A, B, and C of Section II.

E. Registrant effected, otherwise than on a national securities exchange, certain of the transactions hereinabove mentioned in Paragraphs A, B, and C of Section II.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(Seal)

WESTERN UNION

W. P. MARSHALL, President

CD103 LONG DL PD—AS SAN FRANCISCO CALIF 20 1110A
ABRAHAM M. METZ
165 BROADWAY

RE MAGMA KING 24SF-1678. AM ADVISED COMMISSION TODAY ORDERED INSTITUTION OF PROCEEDINGS TO DETERMINE WHETHER REGISTRATION OF WEBBER MILLIKAN SHOULD BE REVOKED. UNDER ALL CIRCUMSTANCES COMMISSION HAS DETERMINED THAT NO OFFERING SHOULD BE MADE UNLESS OFFERING CIRCULAR REVISED TO DISCLOSE (A) PENDENCY OF ABOVE REVOCATION PROCEEDINGS AND (B) THAT MARKET PRICE NOW DISCLOSED IN CIRCULAR IS AN ARBITRARY PRICE ESTABLISHED IN MARKET DOMINATED BY WEBBER MILLIKAN AND THAT OTHER DEALERS ARE NOW SELLING MAGMA STOCK AT 30 CENTS. IF OFFERING IS MADE OTHERWISE THAN BY CIRCULAR, PROSPECTIVE PURCHASERS SHOULD BE OTHERWISE ADVISED OF FOREGOING.

ARTHUR E. PENNEKAMP
SECURITIES AND EXCHANGE COMMISSION

MAGMA 24SF-1678 A PENDENCY 30.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 539

CHARLES M. WEBER, DOING BUSINESS AS WEBER-MILLICAN & COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

Petitioner seeks review in this Court of a *per curiam* decision of the Court of Appeals for the Second Circuit which affirmed an order of the Securities and Exchange Commission. The opinion of the court below (Pet. 26) is reported at 222 F. 2d 822.

In its order which was affirmed below, the Commission revoked the registration of petitioner as a securities broker and dealer under the Securites Exchange Act of 1934 and expelled him from membership in the National Association of Securities Dealers, Inc., a national securities associa-

tion registered with the Commission pursuant to that Act. The Commission's order was predicated upon findings (Pet. 17–23) that petitioner had wilfully violated the anti-fraud provisions of Section 17 (a) of the Securities Act of 1933, 48 Stat. 74, 84, 15 U. S. C. 77q (a) (Pet. 11–12), and Section 15 (c) (1) of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 49 Stat. 1377; 52 Stat. 1075, 15 U. S. C. 78o (c) (1), together with Rule X–15C1–2 promulgated thereunder (Pet. 12–13).

The violations occurred in connection with sales by petitioner of stock of Inland Oil Company (Inland) and Magma King Manganese Mining Company (Magma King). Briefly, the Commission found that petitioner, while selling stock of Inland to the public as underwriter, improperly caused the diversion of funds from Inland to his own use and that his failure to disclose this diversion constituted fraudulent conduct. The Commission's conclusion was based also on petitioner's failure to disclose other material discrepancies between statements contained in the prospectus used in the sale of the stock and the actual facts. In addition, it was found that affirmative false representations were made in the sales of Inland stock. (Pet. 18–21.) The court below held that "[t]he evidence amply supports the Commission's conclusions that petitioner was guilty of fraudulent misstatements and of wrongful diversions of funds in connection with his underwriting of an issue of stock for Inland" (Pet. 26).

With respect to the Magma King transactions, the Commission found that (a) petitioner's failure to reveal that the price at which he sold the stock was substantially above the prevailing market price, and (b) petitioner's express misrepresentations as to the prevailing market price of the stock constituted fraudulent conduct within the meaning of the anti-fraud provisions cited above. Between December 1952 and January 1953, petitioner purchased shares of Magma King stock from other brokers and dealers at an average price of 27 cents a share and from members of the public at an average price of 28.6 cents a share. During this period, petitioner sold the stock to the public at a price, in almost every instance, of 40 cents a share. His average mark-up over cost was 43½%. During this period, the stock was quoted in the daily sheets published by the National Quotation Bureau, which gives the prices bid and asked by interested dealers for securities traded outside the securities exchanges. The price which petitioner charged his customers was 38.9%, on the average, above the highest current independent offering price of the stock in the National Daily Quotation Sheets. (Pet. 21–22.) The court below held that "the Commission was equally justified in finding that petitioner had sold Magma King shares to the general public on his own account without adequate disclosure of the great disparity between his sales price and the current market prices" (Pet. 26). The court

also stated that it saw no reason not to adhere to its prior decision in *Charles Hughes & Co.* v. *S. E. C.*, 139 F. 2d 434 (C. A. 2), certiorari denied, 321 U. S. 786, permitting the introduction of National Daily Quotation Sheets as evidence of such market prices.

The Commission found that the violations with respect to either the Inland or the Magma King stock would by themselves warrant the sanctions imposed[1] (Pet. 23). The Court of Appeals concluded its opinion with the observation that the sanctions imposed by the Commission for "these serious breaches of duty by the petitioner were certainly not so excessive as to constitute an abuse of administrative discretion" (Pet. 26).

1. Petitioner contends that certiorari should be granted on the ground that the admission of the National Daily Quotation Sheets in evidence was improper and that therefore there is insufficient evidence in the record to support the findngs that petitioner violated the Acts as regards the Magma King transactions. Obviously this question is not one of general importance or appropriate for review by this Court. Nor, as petitioner concedes (Pet. 7), does the decision of the court below as to the admissibility of the sheets conflict with a decision of any other court of appeals. In addition, as already noted, this evidence is relevant

[1] As above noted, these sanctions were revocation of petitioner's registration as a broker and dealer and expulsion from the National Association of Security Dealers (Pet. 23).

only to the charges arising out of petitioner's sales of Magma King stock, and both the Commission and the court below agreed that petitioner also had committed equally flagrant violations of the anti-fraud provisions of the Acts in his sales of Inland shares.

2. With respect to petitioner's further contention that the sanctions imposed constituted an abuse of administrative discretion under the circumstances of this case, it is manifest that such an allegation presents no important question of federal law appropriate for review by this Court.

3. The final ground upon which petitioner seeks review by this Court is a claim that he has been denied due process of law since Congress has combined in the Commission, as an agency, the functions of "investigator, prosecutor and adjudicator" of violations of the Federal securities laws. Although a similar contention was contained in the petition for review filed with the court below, petitioner did not urge the point in his brief below.

In the present petition, petitioner cites generally the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, as evidence that such a combination of functions is to be condemned. However, he cites no provision of that Act which was not complied with in the present proceeding and cites no case holding such a combination of functions violative of due process. Indeed, the section of the Administrative Procedure Act

which deals with the separation of administrative functions, Section 5 (c), 60 Stat. at 240, 5 U. S. C. 1004 (c), makes it illegal to combine such functions in particular individuals but specifically excepts from its provisions "the agency or any member or members of the body comprising the agency". This exception was expressly recognized in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, which petitioner cites to support his position (Pet. 5). In the more recent case of *Marcello* v. *Bonds,* 349 U. S. 302, this Court held that the fact that a special inquiry officer in deportation proceedings was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions did not so strip the deportation hearing of fairness and impartiality as to make the procedure violative of due process. Although numerous federal agencies are designated by Congress to perform such a combination of functions, this Court has never held this to be a violation of the constitutional guarantee of due process, and a number of lower courts have overruled such contentions. See *Levers* v. *Berkshire,* 159 F. 2d 689 (C. A. 10); *Berkshire Employees Ass'n* v. *N. L. R. B.,* 121 F. 2d 235 (C. A. 3); *Wright* v. *S. E. C.,* 112 F. 2d 89 (C. A. 2); *Palmer* v. *Ultimo,* 69 F. 2d 1 (C. A. 7); *Reynolds* v. *United States ex rel. Dean,* 68 F. 2d 346 (C. A. 4). Actually, petitioner's position is unrealistic. The Commissioners themselves exercise only a most gen-

eral guidance over investigations and enforcement activities which are under the direct supervision of its various division heads, and the individuals engaged in the performance of investigative or prosecuting functions do not participate or advise in the decision of the case except as witness or counsel in public proceedings.

In conclusion, we submit that the contentions of petitioner provide no occasion for further review by this Court, that no important question is presented by the petition, and that there is no conflict in the decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WILLIAM H. TIMBERS,
General Counsel,
ARVEN L. ANDRESEN,
Special Counsel,
ELIZABETH B. A. ROGERS,
Attorney,
Securities and Exchange Commission.

DECEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955